

## Brooklyn Law Review

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Volume 76 | Issue 4

Article 10

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2011

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### Recommended Citation

T. Daris Isbell, *Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 Brook. L. Rev. (2011).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol76/iss4/10>

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# Making Up for Lost Educational Opportunities

## DISTINGUISHING BETWEEN COMPENSATORY EDUCATION AND ADDITIONAL SERVICES AS REMEDIES UNDER THE IDEA

### INTRODUCTION

The Individuals with Disabilities Education Act (IDEA)<sup>1</sup> provides that students with disabilities are entitled to a free appropriate public education (FAPE).<sup>2</sup> One of the original purposes of the IDEA was to reduce parents' reliance on the judicial system to obtain relief for children with disabilities who have been denied a FAPE.<sup>3</sup> Despite the intentions of

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<sup>1</sup> 20 U.S.C. §§ 1400-1482 (2006). The IDEA was originally named the Education for All Handicapped Children Act. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. In 1990, Congress revised and amended the Act, renaming it the Individuals with Disabilities Education Act (IDEA). *See* Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, § 901(a)(1), 104 Stat. 1103, 1141-42. In 2004, the Act was amended and reauthorized as the Individuals with Disabilities Education Improvement Act. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, § 1, 118 Stat. 2647, 2647. Given the various amendments and name changes over the years, the IDEA is often referred to as the Education of the Handicapped Act (EHA); the Education for All Handicapped Children Act (EAHCA); Public Law 94-142; the Individuals with Disabilities Education Act (IDEA); and the Individuals with Disabilities Education Improvement Act (IDEIA). *See* THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 3 (3d ed. 2008) (tracing the name changes of the Act). For the sake of clarity, this note will use either "IDEA" or "the Act" when referring to the Act, except when discussing the history of the Act.

<sup>2</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>3</sup> S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433. In 1975, the Senate Committee expressed its intention of providing a guarantee of equal educational opportunity, reducing parents' reliance on the judicial system:

[P]arents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school.

Congress, tensions between parents and school districts have grown over the last thirty-five years, with both parties resorting to the courts for clarification of the IDEA's mandates.<sup>4</sup>

A primary source of IDEA litigation has been the continuing confusion over what constitutes an "appropriate" remedy for the denial of a FAPE.<sup>5</sup> The IDEA did not originally clarify what relief is available to remedy a denial of a FAPE, stating simply that courts can grant "such relief as the court determines is appropriate."<sup>6</sup> While courts initially interpreted the word *appropriate* narrowly, the range of available remedies expanded in recent years.<sup>7</sup> In its amendments to the IDEA, Congress codified and clarified some of the judicially created remedies, such as tuition reimbursement.<sup>8</sup> However, Congress has not clarified whether compensatory educational services are appropriate remedies under the IDEA, leaving the issue for the courts to decide.<sup>9</sup>

The lower courts, lacking clarification from Congress and the Supreme Court, have struggled to outline the contours of compensatory educational services as remedies for denials of FAPE, resulting in a confusing body of jurisprudence.<sup>10</sup> Courts do not agree on the availability of the remedy,<sup>11</sup> and the circuits

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*Id.* The amount of litigation surrounding the IDEA has been a continuing concern of Congress and later amendments have attempted to address the problem. See Tara L. Eyer, Comment, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613, 626-27 (1999).

<sup>4</sup> Alison Leigh Cowan, *Amid Affluence, a Struggle over Special Education*, N.Y. TIMES, Apr. 24, 2005, § 1, at 37, available at [http://www.nytimes.com/2005/04/24/education/24westport.html?pagewanted=1&\\_r=1%22%20costs&sq&st=cse%22special%20education&scp=3](http://www.nytimes.com/2005/04/24/education/24westport.html?pagewanted=1&_r=1%22%20costs&sq&st=cse%22special%20education&scp=3).

<sup>5</sup> See CHARLES J. RUSSO & ALLAN G. OSBORNE, JR., *ESSENTIAL CONCEPTS & SCHOOL-BASED CASES IN SPECIAL EDUCATION LAW* 233 (2008).

<sup>6</sup> 20 U.S.C. § 1415(i)(2)(C)(iii).

<sup>7</sup> See MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 294 (1998) (explaining that the definition of "appropriate relief" has expanded to include not only injunctive remedies, but also other remedies such as tuition reimbursement and compensatory education).

<sup>8</sup> See 20 U.S.C. § 1412(a)(10)(C) (outlining the tuition reimbursement remedy); RUSSO & OSBORNE, JR., *supra* note 5, at 233; see also *infra* Part III.A.

<sup>9</sup> See generally GUERNSEY & KLARE, *supra* note 1, at 235-37 (tracing the history of compensatory education).

<sup>10</sup> See James Schwellenbach, Comment, *Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals When Awarding Compensatory Education for a Violation of the Individuals with Disabilities Education Act*, 53 ME. L. REV. 245, 266-79 (2001) (examining the different standards used by the circuit courts in compensatory education cases).

<sup>11</sup> Compare *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860, 868-69 (D.N.H. 1992) (finding that compensatory education can only be awarded to students who are over twenty-one or otherwise ineligible for services under the IDEA), with

have developed different standards for addressing compensatory education awards.<sup>12</sup> Further complicating the issue is the ongoing uncertainty surrounding what standard the courts should apply to determine whether a student has been denied a FAPE and is therefore entitled to compensatory educational services.<sup>13</sup> Central to this confusion is the issue of whether compensatory education should be available to students who are no longer protected by the IDEA because they have graduated or turned twenty-one years of age.<sup>14</sup>

In theory, compensatory educational services remedies can be divided into two distinct categories: (1) “compensatory education” and (2) “additional services.”<sup>15</sup> While the two remedies are similar, there are significant differences between them, especially regarding the legal standards that should be applied to each. On the one hand, “compensatory education” is an exceptional remedy that requires a school district to fund a child’s education *even after the child is no longer protected by the IDEA* because she has either graduated or reached the age of twenty-one.<sup>16</sup> “Additional services,” on the other hand, can only be awarded as a remedy to students who are still eligible for instruction under the IDEA, but have been improperly denied services.<sup>17</sup> Courts tend to lump both remedies together under the “compensatory education” title.<sup>18</sup> However, this note argues that the two remedies should be treated differently, and different

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Student X v. N.Y.C. Dep’t of Educ., No. 07-CV-2316, 2008 WL 4890440, at \*24 (E.D.N.Y. Oct. 30, 2008) (finding that compensatory education can be awarded to students both under and over twenty-one years old).

<sup>12</sup> See Schwellenbach, *supra* note 10, at 266-79.

<sup>13</sup> See generally David Ferster, *Broken Promises: When Does a School’s Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 87-96 (2010) (comparing the “materiality” standard with the *per se* approach); Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 373-77 (2008) (advocating for an updated FAPE standard).

<sup>14</sup> See GUERNSEY & KLARE, *supra* note 1, at 237.

<sup>15</sup> Impartial Hearing Officers (IHO) in New York treat the two compensatory remedies distinctly, following the reasoning of the New York Office of State Review. See, e.g., Application of a Student with a Disability, Appeal No. 08-072, 11 (N.Y. State Educ. Dep’t Oct. 15, 2008), <http://www.sro.nysed.gov/decisionindex/2008/08-072.pdf> (distinguishing compensatory education from additional services).

<sup>16</sup> Somoza v. N.Y.C. Dep’t of Educ., 538 F.3d 106, 109 n.2 (2d Cir. 2008).

<sup>17</sup> Application of a Student with a Disability, Appeal No. 08-072, 11 (N.Y. State Educ. Dep’t Oct. 15, 2008), <http://www.sro.nysed.gov/decisionindex/2008/08-072.pdf>.

<sup>18</sup> See, e.g., Student X v. N.Y.C. Dep’t of Educ., No. 07-CV-2316, 2008 WL 4890440, at \*28 (E.D.N.Y. Oct. 30, 2008) (referring to the remedy as “compensatory education” when in reality the court was awarding “additional services”).

standards should be used to evaluate cases contemplating each type of relief.

The difference between the two remedies is especially important in the Second Circuit, where the court has traditionally applied a strict “gross violation” standard to compensatory education cases.<sup>19</sup> In *Student X v. New York City Department of Education*, the United States District Court for the Eastern District of New York awarded a compensatory remedy to a student who was still qualified for protection under the IDEA without deciding whether the “gross violation” standard applied outside the context of compensatory education awards.<sup>20</sup> Whether the “gross violation” standard applies to *additional services* cases is still an open question in the Second Circuit.<sup>21</sup>

Part I of this note explores the background and history of the IDEA, as well as the IDEA’s requirements for school districts. Part II examines the standards courts employ to determine whether a student has been denied a FAPE, arguing that courts should apply different standards depending on whether they are awarding compensatory education or additional services. In the context of additional services awards, part II advocates for the adoption of a standard that better reflects recent amendments to the IDEA. Part III considers the development of both types of compensatory remedies—“compensatory education” and “additional services”—in detail. Finally, part IV uses the Second Circuit’s “gross violation” standard to illustrate the confusion that stems from the current application of the IDEA and proposes solutions to help courts craft better compensatory remedies.

## I. BACKGROUND AND REQUIREMENTS OF THE IDEA

Much of the confusion surrounding the applicable legal standards for compensatory educational services awards originates from the maturation of the IDEA’s goals and

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<sup>19</sup> See, e.g., *Mrs. C v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990).

<sup>20</sup> *Student X*, 2008 WL 4890440, at \*23-24 (finding that the student was entitled to a compensatory remedy and that regardless of whether the gross violation standard applied, it had been satisfied).

<sup>21</sup> See *id.* at \*24-25. The “gross violation” standard has not been adopted by any of the other federal circuit courts. See Schwellenbach, *supra* note 10, at 266-79 (examining the different standards used by each circuit court in compensatory education cases).

purposes,<sup>22</sup> as well as the evolving nature of the remedies available under the IDEA.<sup>23</sup> The history of the IDEA provides the necessary context for understanding the source of judicial confusion regarding these remedies, while the IDEA's requirements supply the essential framework for addressing why these two forms of relief should be treated distinctly.

#### A. *History and Overview of the IDEA*

By the beginning of the twentieth century, most states had compulsory school attendance laws, yet many states—either by court decree or statute—allowed for the exclusion of students with disabilities.<sup>24</sup> Special education students, viewed as a disruptive influence in the classroom, were often segregated from the general education population.<sup>25</sup> The prevailing view at the time was that students with disabilities “were unable to reap the benefits of a good education.”<sup>26</sup>

The educational prospects for children with disabilities improved significantly with the Supreme Court's landmark decision in *Brown v. Board of Education*.<sup>27</sup> In *Brown*, the Supreme Court stressed the importance of providing a public education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>28</sup>

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<sup>22</sup> See, e.g., Huefner, *supra* note 13, at 369-77 (tracing some of the important amendments to the IDEA).

<sup>23</sup> See GUERNSEY & KLARE, *supra* note 1, at 235-37; see also *infra* Part III.

<sup>24</sup> See generally YELL, *supra* note 7, at 54-55 (discussing compulsory attendance and the exclusion of students with disabilities).

<sup>25</sup> LAURA ROTHSTEIN & SCOTT F. JOHNSON, SPECIAL EDUCATION LAW 9 (4th ed. 2010).

<sup>26</sup> YELL, *supra* note 7, at 54-55.

<sup>27</sup> 347 U.S. 483 (1954).

<sup>28</sup> *Id.* at 493.

This reasoning from *Brown* formed an important basis for later cases that were brought on behalf of students with disabilities.<sup>29</sup> In both *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania*<sup>30</sup> and *Mills v. Board of Education*,<sup>31</sup> the federal courts relied partially on *Brown* to establish that students with disabilities are entitled to a free public education and that this right should be protected by procedural safeguards.<sup>32</sup> In turn, the principles established in *PARC* and *Mills* were largely incorporated by Congress in the passing of the Education for All Handicapped Children Act (EAHCA) in 1975.<sup>33</sup>

Prior to the enactment of the EAHCA, the precursor to the IDEA, Congress determined that the needs of students with disabilities were not being met.<sup>34</sup> Specifically, Congress realized that many special education students were not being properly identified and diagnosed by schools, were not receiving appropriate educational interventions, and were often unnecessarily alienated from their peers.<sup>35</sup> To address these problems, Congress enacted the Act to guarantee that special

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<sup>29</sup> See YELL, *supra* note 7, at 59.

<sup>30</sup> 343 F. Supp. 279 (E.D. Pa. 1972). In *PARC*, the state of Pennsylvania entered into a consent agreement to provide all students with intellectual disabilities between the ages of six and twenty-one a "free public program of education and training appropriate to [the students'] learning capabilities." *Id.* at 302. The consent agreement also provided parents of students with intellectual disabilities procedural protections, such as notice and the right to a hearing. *Id.* at 303.

<sup>31</sup> 348 F. Supp. 866 (D.D.C. 1972). In *Mills*, the United States District Court for the District of Columbia ordered the school district to provide students with disabilities "a free and suitable publicly-supported education." *Id.* at 878. The *Mills* court set forth detailed due process hearing procedures the school district was required to implement and follow. *Id.* at 879-83.

<sup>32</sup> See YELL, *supra* note 7, at 59-60 (discussing the importance of *Brown* to later cases brought on behalf of students with disabilities); see also H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 30 (3d ed. 1990) ("Although *Brown* established the right to an equal educational opportunity based upon Fourteenth Amendment grounds, it was not until [*PARC*] v. *Commonwealth of Pennsylvania* and *Mills v. D.C. Board of Education* that *Brown* became meaningful for handicapped children.").

<sup>33</sup> See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; see also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 193-94 (1982) (examining the legislative history of the Act). The purpose of the EAHCA was to provide students with disabilities access to a FAPE. See Pub. L. No. 94-142, § 3(c), 89 Stat. 773, 775 (1975). The Supreme Court initially interpreted the original version of the Act as providing a "basic floor of opportunity." *Rowley*, 458 U.S. at 201.

<sup>34</sup> See 20 U.S.C. § 1400(c)(2) (2006).

<sup>35</sup> See *id.*; see also Terry Jean Seligmann, *A Diller, a Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 472-73 (2002) (examining Congress's findings that students with disabilities were being excluded from school or otherwise not being provided with an appropriate education).

education students would receive an appropriate education to meet their unique needs.<sup>36</sup>

The IDEA's primary purpose was to address the needs of millions of students with disabilities by ensuring their access to a "free appropriate public education."<sup>37</sup> The underlying policy of the Act is expressly stated in the statute:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.<sup>38</sup>

The purpose of the IDEA is not only to protect the educational rights of students with disabilities, but also to assist state and local agencies in providing appropriate education for this population of students.<sup>39</sup> Thus, the IDEA is intended to ensure that states provide early intervention programs to identify students with disabilities so that their individual needs can be properly addressed at an early age.<sup>40</sup>

Unlike other legislation to protect persons with disabilities, such as the Americans with Disabilities Act (ADA), the IDEA, largely a funding statute, is unique in its application to the states.<sup>41</sup> While the ADA applies to schools regardless of whether they accept federal funding, the IDEA provides additional federal funds to states that conform to the rules and policies of the Act.<sup>42</sup> Unlike the ADA, the IDEA "is couched in the language of specific positive education rights, rather than that of nondiscrimination."<sup>43</sup> The substantive right conferred by the IDEA is access to a FAPE, in the least restrictive

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<sup>36</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>37</sup> *Id.* § 1400(c)(2).

<sup>38</sup> *Id.* § 1400(c)(1).

<sup>39</sup> *Id.* § 1400(d).

<sup>40</sup> *Id.*

<sup>41</sup> See GUERNSEY & KLARE, *supra* note 1, at 9.

<sup>42</sup> 20 U.S.C. § 1407(a) ("Each State that receives funds under this chapter shall—(1) ensure that any State rules, regulations, and policies relating to this chapter conform to the purposes of this chapter; (2) identify in writing to local educational agencies located in the State and the Secretary any such rule, regulation, or policy as a State-imposed requirement that is not required by this chapter and Federal regulations; and (3) minimize the number of rules, regulations, and policies to which the local educational agencies and schools located in the State are subject under this chapter.").

<sup>43</sup> Lynn M. Daggett, Perry A. Zirkel & LeeAnn L. Gurysh, *For Whom the School Bell Tolls but Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717, 727 (2005).



environment (LRE), that is specially tailored to meet the individual needs of a student.<sup>44</sup> While states have the option to accept funding under the IDEA, and thereby agree to be bound by its requirements, every state has opted to do so.<sup>45</sup>

### B. *Requirements of the IDEA*

The IDEA requires schools to provide a FAPE to each student with a disability. A FAPE has two components: (1) a “special education” program and (2) “related services.”<sup>46</sup> “Special education” is defined in the regulations as “specially designed instruction . . . conducted in the classroom, in the home, in hospitals and institutions, and in other settings” and also includes physical education.<sup>47</sup> “Related services” include “supportive services” such as counseling and speech therapy.<sup>48</sup> School districts must provide these two components of a FAPE at public expense, without any charge to the parents, from preschool through secondary school.<sup>49</sup>

School districts must follow specific regulations under the IDEA that require school districts to (1) evaluate students with disabilities before providing special education services,<sup>50</sup> (2) tailor each special education student’s program according to his or her “Individualized Education Program,”<sup>51</sup> (IEP) and (3)

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<sup>44</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5).

<sup>45</sup> See YELL, *supra* note 7, at 72. New Mexico was the last state to accept IDEA funding, upon realizing that in order to meet the mandates of Section 504 of the Rehabilitation Act it essentially had to comply with much of the IDEA. *Id.*

<sup>46</sup> 20 U.S.C. § 1401(9).

<sup>47</sup> 34 C.F.R. § 300.39(a)(1) (2010).

<sup>48</sup> *Id.* § 300.34(a). The regulation reads in part:

*Related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

*Id.*

<sup>49</sup> 20 U.S.C. § 1401(9). Generally, states must provide students between ages three and twenty-one with a FAPE, *see id.* § 1412(a)(1)(A), but in all cases for students between the ages of five and seventeen. *See id.* § 1412(a)(1)(B); *see also* TURNBULL III, *supra* note 32, at 37 (discussing age requirements).

<sup>50</sup> 34 C.F.R. § 300.301.

<sup>51</sup> *Id.* § 300.323.

provide procedural safeguards to protect the rights of parents and students.<sup>52</sup>

## 1. Evaluations

A student cannot receive special education services until she has been properly evaluated to determine whether she has a disability and, if so, whether she requires special education services.<sup>53</sup> The IDEA and U.S. Department of Education regulations specify the procedures school districts must follow in identifying and evaluating students who might have a disability.<sup>54</sup> Either a parent or the school may request an initial evaluation to determine if a child has a disability.<sup>55</sup> Once a request has been made, a public agency<sup>56</sup> must conduct an evaluation, which must consist of a variety of assessment tools and methods to compile relevant data on the student, including his or her academic, functional, and developmental levels.<sup>57</sup> This information must then be used to determine whether the student has a disability and to identify the child's educational needs.<sup>58</sup> Schools are then required to reevaluate identified students at least every three years unless the school and parents agree otherwise.<sup>59</sup>

## 2. The Individualized Education Program (IEP)

Schools are required to provide each identified special education student with an IEP, which is a written document that is developed and reviewed according to specified

<sup>52</sup> *Id.* § 300.500.

<sup>53</sup> *See* YELL, *supra* note 7, at 223.

<sup>54</sup> *See* 20 U.S.C. § 1414(a); *see also* 34 C.F.R. § 300.301.

<sup>55</sup> 34 C.F.R. § 300.301. The school district must obtain parental consent before commencing the initial evaluation of a child. *Id.* § 300.300(a)(1). If the parent fails to consent to the initial evaluation, school districts may, but are not required, to utilize the procedural safeguards outlined in 34 C.F.R. § 300.506 to seek an initial evaluation of a student with a suspected disability. *Id.* § 300.300(a)(3)(i).

<sup>56</sup> "Public agency" includes the state educational agency, local educational agency, educational service agency, nonprofit public charter schools, or "any other political subdivisions of the State that are responsible for providing education to children with disabilities." *Id.* § 300.33.

<sup>57</sup> *See id.* § 300.304(b); *see also* GUERNSEY & KLARE, *supra* note 1, at 57-74 (summarizing the identification and evaluation requirements of the IDEA).

<sup>58</sup> *See* 20 U.S.C. § 1414(a); *see also* 34 C.F.R. § 300.301(a).

<sup>59</sup> 34 C.F.R. § 300.303(b). While the reevaluation process is only required every three years, the IEP Team is required to meet at least annually to review each special education student's IEP. *See id.* § 300.324(b).

procedures.<sup>60</sup> The Supreme Court has described the IEP as the “centerpiece” of the Act—the “primary vehicle” for carrying out Congress’s goals.<sup>61</sup> Each IEP must include (1) a statement of the student’s current level of functioning;<sup>62</sup> (2) a statement of “measurable annual goals” designed to meet the student’s individual needs;<sup>63</sup> (3) a description of how and when progress towards these goals will be measured;<sup>64</sup> (4) a statement of the related services to be provided to the student;<sup>65</sup> (5) a statement explaining to what extent, if any, a child will be excluded from the regular classroom;<sup>66</sup> and (6) a statement outlining any testing accommodations to be provided to the student.<sup>67</sup> The IDEA regulations also require the IEP to be developed and reviewed annually by an “IEP Team,” which must include the parents and specified teaching professionals.<sup>68</sup>

### 3. Procedural Safeguards

In addition to the evaluation and IEP requirements, school districts must also provide procedural safeguards to protect the due process rights of parents and students.<sup>69</sup> One of the primary protections provided by the IDEA is the parental right to notice.<sup>70</sup> School districts are required to provide parents with notice, written in plain English, explaining all of the procedural safeguards under the IDEA.<sup>71</sup> Each school district is

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<sup>60</sup> *Id.* § 300.320(a).

<sup>61</sup> *Honig v. Doe*, 484 U.S. 305, 311 (1988).

<sup>62</sup> 34 C.F.R. § 300.320(a)(1). The statement of a student’s present level of functioning must also state how the child’s disability affects his or her participation in the general education curriculum. *Id.*

<sup>63</sup> *Id.* § 300.320(a)(2). The annual goals are required to be designed to meet a student’s individual needs and to allow the student to make progress in the general education curriculum. *Id.*

<sup>64</sup> *Id.* § 300.320(a)(3). Schools are required to periodically issue reports on whether the student is meeting his or her IEP goals. *Id.* These reports should be issued when report cards are provided. *Id.*

<sup>65</sup> *Id.* § 300.320(a)(4). The IEP must also include a statement of what “program modifications or supports” will be provided to allow the student to reach his or her annual goals. *Id.*

<sup>66</sup> *Id.* § 300.320(a)(5).

<sup>67</sup> *Id.* § 300.320(a).

<sup>68</sup> *Id.* §§ 300.321, 300.324(b). The “IEP Team” must include the parents of the child, at least one regular education teacher, at least one special education teacher, a representative of the school district, and, whenever appropriate, the child. *Id.* § 300.321.

<sup>69</sup> *Id.* § 300.500.

<sup>70</sup> See GUERNSEY & KLARE, *supra* note 1, at 147 (“The significance of notice as a procedural right cannot be underestimated.”).

<sup>71</sup> 34 C.F.R. § 300.504.

also required to have procedures in place that allow parents to challenge school district action (or inaction) under the IDEA and to resolve disputes.<sup>72</sup> The IDEA requires school districts to develop a voluntary mediation process where the parents and school districts can attempt to reach a legally binding resolution.<sup>73</sup> If the mediation process is unsuccessful, parents can proceed with a due process complaint through the school district's impartial hearing process.<sup>74</sup> Once a parent or school district has exhausted this administrative process, the aggrieved party may bring a civil action in either state or federal court.<sup>75</sup>

The evaluations, IEP processes, and procedural safeguards required by the IDEA were designed by Congress to achieve the dual goals of guaranteeing special education students access to a FAPE and ensuring parental participation in the process.<sup>76</sup> Given the IDEA's procedurally centered framework, perhaps it is no surprise that courts developed a FAPE standard that scrutinizes a school's compliance with the Act's procedural mandates as well as a school's fulfillment of the IDEA's substantive requirements.<sup>77</sup> Despite Congress's continued emphasis on the IDEA's procedural requirements, courts have failed to recalibrate the standards for awarding compensatory educational services to account for the increasingly complex requirements enumerated in recent IDEA amendments, especially for the IEP creation and implementation process.<sup>78</sup>

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<sup>72</sup> *Id.* § 300.506(a).

<sup>73</sup> *Id.* § 300.506.

<sup>74</sup> *See id.* § 300.511; *see generally* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401 (2006) (examining the remedial authority of impartial hearing and review officers under the IDEA). The IDEA allows states to have either a one- or two-tiered administrative review process. *See* 20 U.S.C. § 1415(g) (2006). If the initial impartial hearing is conducted by any agency besides the state's educational agency, then the party must be allowed to appeal to the state's educational agency. *See* 34 C.F.R. § 300.514 (setting forth the requirements of an administrative appeal at the state administrative level).

<sup>75</sup> *See* 20 U.S.C. § 1415(i)(2).

<sup>76</sup> *See* Thomas F. Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for all Handicapped Children Act*, 36 CLEV. ST. L. REV. 67, 70 (1988).

<sup>77</sup> *See infra* Part II.

<sup>78</sup> *See* Dixie Snow Huefner, *The Risks and Opportunities of the IEP Requirements Under IDEA '97*, 33 J. SPECIAL EDUC. 195, 196-97 (2000) (comparing the 1990 and 1997 versions of the IDEA and finding the latter to have expanded the IEP requirements).

## II. DEFINING "FREE APPROPRIATE PUBLIC EDUCATION"

The IDEA requires school districts to provide students with disabilities a "free appropriate public education," but the Act does not define the word *appropriate*.<sup>79</sup> Without a statutory definition, most courts still rely on slightly expanded versions of the Supreme Court's early definition of FAPE when deciding whether to award a remedy.<sup>80</sup> In 1982, the Supreme Court, in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, interpreted the meaning of *free appropriate public education*.<sup>81</sup> After reviewing the legislative history of the Act, Justice Rehnquist concluded that, while the Act requires school districts to provide special education and related services to students with disabilities, the Act does not require school districts to "maximize" each student's potential.<sup>82</sup> The *Rowley* Court held that a state satisfies the FAPE requirement by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."<sup>83</sup> The minimalist FAPE standard required by *Rowley* treats the IDEA as setting a "basic floor of opportunity" for students with disabilities.<sup>84</sup>

In reaching its decision, the *Rowley* court set forth a two-step test to analyze denial of FAPE claims:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these

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<sup>79</sup> See 20 U.S.C. § 1401 (setting forth definitions under the IDEA).

<sup>80</sup> See Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?*, 39 SUFFOLK U. L. REV. 1, 6-7 (2005) (examining how the circuit courts are divided in interpreting the *Rowley* FAPE standard).

<sup>81</sup> 458 U.S. 176, 186, 203 (1982).

<sup>82</sup> *Id.* at 198-99.

<sup>83</sup> *Id.* at 203.

<sup>84</sup> *Id.* at 201 (internal quotations omitted); see also Eyer, *supra* note 3, at 622 (arguing the *Rowley* FAPE standard "set the tone for low expectations and minimal compliance by educational agencies"). In describing the *Rowley* FAPE standard, the Sixth Circuit used an automobile analogy, stating that the Act requires the provision of a "serviceable Chevrolet," but not a "Cadillac." *Doe ex rel. Doe v. Bd. of Educ.*, 9 F.3d 455, 459-60 (6th Cir. 1993); see also Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 228-29 & n.47 (2005) (collecting cases using and expanding on the automobile analogy).

requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.<sup>85</sup>

The two-step test developed in *Rowley* thus bifurcated the FAPE requirement into a procedural requirement and a substantive requirement.<sup>86</sup>

#### A. *The Procedural Requirement of a FAPE*

The procedural protections of the IDEA are intended to ensure that parents have a voice in their child's educational placement.<sup>87</sup> The procedural safeguards conferred on parents of students with disabilities were explicitly outlined by Congress in the IDEA.<sup>88</sup> In *Rowley*, the Supreme Court recognized that Congress "placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."<sup>89</sup>

A school can be found to have denied a student a FAPE on procedural grounds if it failed to adhere to the IDEA's procedural requirements, resulting in harm to the student.<sup>90</sup> A number of courts have found that procedural violations alone are sufficient to establish a denial of a FAPE.<sup>91</sup> For example, the Fourth Circuit held that a school district denied a student a FAPE when it decided to move a student from a residential facility to a public school and then developed a post-hoc IEP to reflect this decision.<sup>92</sup> Similarly, in *W.G. v. Board of Trustees of Target Range School District No. 23*, the school district proposed a "preexisting, predetermined program" without any input from the student's general education teacher, and the school refused to consider any alternatives despite the parents' objection to the

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<sup>85</sup> 458 U.S. at 206-07.

<sup>86</sup> See GUERNSEY & KLARE, *supra* note 1, at 33-34.

<sup>87</sup> See YELL, *supra* note 7, at 146.

<sup>88</sup> See *supra* Part I.B.3.

<sup>89</sup> 458 U.S. at 205-06.

<sup>90</sup> See YELL, *supra* note 7, at 153.

<sup>91</sup> See, e.g., *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (finding that procedural violations are sufficient by themselves to establish a denial of a FAPE); *Mrs. C. v. Wheaton*, 916 F.2d 69, 72, 75 (2d Cir. 1990) (finding that a student was entitled to compensatory education where a school district failed to provide parental notice before terminating the student's educational placement).

<sup>92</sup> *Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 257, 259 (4th Cir. 1988) (finding that the school's "failure to follow [IDEA] procedures is sufficient to hold that the defendants failed to provide [the student] with a FAPE").

IEP.<sup>93</sup> The Ninth Circuit found that the school district “failed to provide [the student] with a FAPE by failing to comply with the specified procedures for preparing the IEP.”<sup>94</sup>

Although procedural violations alone may be enough to establish a denial of a FAPE, a number of courts have found that mere “technical violations” that do not harm the student are not sufficient to establish a denial of a FAPE.<sup>95</sup> The First Circuit, in *Roland M. v. Concord School Committee*, summarized the general rule: “Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.”<sup>96</sup> Therefore, a procedural violation does not automatically result in a denial of a FAPE, but courts are likely to find a denial of a FAPE if the procedural violations have adversely affected the student’s education or impeded the parent from participating in the IEP process.<sup>97</sup>

In the 2004 amendments to the IDEA, Congress clarified what types of procedural violations can amount to a denial of a FAPE, essentially adopting a rule that reflects the test used in *Roland M.*<sup>98</sup> However, even if a court finds that a school district has complied with the IDEA’s procedural mandates, the court may still find a denial of a FAPE if the school has not met the IDEA’s substantive requirement—supplying the student with some educational benefit.<sup>99</sup>

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<sup>93</sup> *W.G. v. Bd. of Trs.*, 960 F.2d 1479, 1484 (9th Cir. 1992).

<sup>94</sup> *Id.* at 1487. In a similar case, the Ninth Circuit also found a procedural violation meriting the vacation of the district court’s summary judgment order in favor of the school district where a school district failed to ensure that a student’s general education teacher attended the IEP meeting. *See M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 651 (9th Cir. 2005).

<sup>95</sup> *See YELL*, *supra* note 7, at 153.

<sup>96</sup> *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990).

<sup>97</sup> *See W.G.*, 960 F.2d at 1484 (internal citations omitted).

<sup>98</sup> *See Individuals with Disabilities Education Improvement Act of 2004*, Pub. L. No. 108-446, § 615(f)(3)(E)(ii), 118 Stat. 2647, 2722 (codified as amended at 20 U.S.C. § 1415(f)(3)(E)(ii) (2006)) (“In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.”).

<sup>99</sup> *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982); *see also infra* Part II.B.

*B. The Substantive Requirement of a FAPE*

While the *Rowley* court only required school districts to supply some educational benefit to students with disabilities, later decisions have required more of school districts.<sup>100</sup> Cases decided shortly after the *Rowley* decision tended to give a strict interpretation to the *Rowley* requirement, finding that an IEP was appropriate as long as it conferred *some* benefit.<sup>101</sup> In later cases, however, courts began to apply various standards that required more than a superficial benefit.<sup>102</sup>

For example, in *Polk v. Central Susquehanna Intermediate Unit 16*, the Third Circuit held that the IDEA requires “more than a trivial educational benefit.”<sup>103</sup> The student in *Polk* had severe mental and physical disabilities, but the school district refused to provide any students with physical therapy.<sup>104</sup> The district court granted summary judgment for the school district, finding that the student’s educational plan, under the *Rowley* standard, resulted in “*some* educational benefit,” even if he was not receiving certain related services.<sup>105</sup> The Third Circuit reversed, finding that the district court had applied the *Rowley* standard out of context.<sup>106</sup>

The Third Circuit relied on both the *Rowley* decision and the legislative history of the IDEA to reach its conclusion that a student’s IEP must be formulated to provide the student with a “meaningful benefit.”<sup>107</sup> After carefully reviewing the history of the IDEA, the court determined that “[j]ust as Congress did not write a blank check, neither did it anticipate that states would engage in the idle gesture of providing special education designed to confer only trivial benefit.”<sup>108</sup> The Third Circuit explained that because the student in *Rowley* had

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<sup>100</sup> See, e.g., *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (“When students display considerable intellectual potential, IDEA requires ‘a great deal more than a negligible [benefit].’” (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988))).

<sup>101</sup> See, e.g., *Doe v. Lawson*, 579 F. Supp. 1314, 1319 (D. Mass. 1984) (stating that the question is whether the “program will provide *some* educational benefit”).

<sup>102</sup> *Huefner*, *supra* note 13, at 368 (“Lower court standards varied, but over time, most courts looked at the student’s IEP and decided that trivial progress toward IEP goals was insufficient and that progress should be ‘meaningful,’ ‘satisfactory,’ or ‘adequate.’”).

<sup>103</sup> 853 F.2d at 180.

<sup>104</sup> *Id.* at 172.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 184.

<sup>108</sup> *Id.*



received a substantial benefit from her education, the *Rowley* court did not have the opportunity to fully examine what level of benefit was required by the IDEA.<sup>109</sup> The *Polk* court rejected the view that the “some benefit” standard in *Rowley* was equivalent to “any benefit at all.”<sup>110</sup> According to *Polk*, the IDEA requires school districts to do more than merely provide students with a “*de minimis* benefit.”<sup>111</sup>

Courts have struggled with the application of the “meaningful benefit” standard, relying on various factors to measure the level of benefit provided by an IEP.<sup>112</sup> Because the courts are wary of “meddling in state educational methodology,” they will look for “objective evidence’ indicating whether the child is likely to make progress or regress under the proposed plan.”<sup>113</sup> In order to measure progression or regression, courts will consider whether the student is attaining passing marks and advancing from grade to grade.<sup>114</sup> This standard is not always an honest measurement of educational benefit, however, because many students with disabilities, especially those in an inclusion setting, will advance from grade to grade despite the lack of any meaningful progress.<sup>115</sup> In addition to looking at a student’s grades and regular advancement, some courts have turned to standardized

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<sup>109</sup> *Id.* at 180.

<sup>110</sup> *Id.* at 183.

<sup>111</sup> *Id.* at 182.

<sup>112</sup> See *YELL*, *supra* note 7, at 155 (explaining that courts do not have a “precise definition to follow when determining whether the education offered is meaningful or trivial,” but that “[t]his lack of precision appears appropriate because what constitutes a meaningful education to particular students can only be ascertained on a case-by-case basis”).

<sup>113</sup> *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (quoting *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997)).

<sup>114</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 n.28 (1982) (“When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.”).

<sup>115</sup> See *Huefner*, *supra* note 13, at 370 (arguing that the Supreme Court in *Rowley* did not anticipate the inclusion movement and the fact that many students with disabilities in the inclusion setting are “often advanced with their chronological peers while not performing academically at grade level”); see also *Straube v. Fla. Union Sch. Dist.*, 801 F. Supp. 1164, 1176-77 (S.D.N.Y. 1992) (“The record suggests that we cannot totally rely on the *Rowley* standard to assess the educational benefit derived by [the student] because the continual decrease in his grades and the failure of his reading level to move up in six years suggests that perhaps [the student] was being moved from grade to grade in order to get him through the system.”).

test scores as a metric of progress.<sup>116</sup> Regardless of the standard employed by the court, a student's "progress must be viewed in light of the limitations imposed by the child's disability."<sup>117</sup> While it is clear that some courts will require a school to provide a student with disabilities a program that confers some "meaningful benefit," it is less clear what measurement standard courts will use to determine the level of benefit.<sup>118</sup>

Given the confusion over what constitutes satisfactory progress under the IDEA, commentators have urged courts to adopt various standards for determining whether a student has been denied a FAPE.<sup>119</sup> Some commentators have argued that courts should adopt a per se approach for determining denials of FAPE.<sup>120</sup> Under a per se approach, a failure to implement any part of an IEP would constitute a denial of a FAPE.<sup>121</sup> The argument is that when the parties have agreed to an IEP, the courts are not in the position to determine what portions of that IEP are material.<sup>122</sup> While the per se approach comports with the IDEA's extensive procedural protections that go toward developing a student's IEP,<sup>123</sup> many courts have rejected it, electing instead to apply a material failure standard.<sup>124</sup>

Others have argued that courts should adopt a FAPE standard that better reflects Congress's emphasis on the IEP,<sup>125</sup>

<sup>116</sup> See, e.g., *K.C. v. Fulton Cnty. Sch. Dist.*, No. 1:03-CV-3501-TWT, 2006 U.S. Dist. LEXIS 47652, at \*48-49 (N.D. Ga. June 30, 2006) (finding that a student's IEP reports, grades, and standardized test scores all indicated "adequate academic progress").

<sup>117</sup> *Mrs. B.*, 103 F.3d at 1121 (citing *Rowley*, 458 U.S. at 202).

<sup>118</sup> See Aron, *supra* note 80, at 7 ("[S]ix Circuit Courts of Appeals apply the 'meaningful benefit' standard, five apply a lesser standard in the nature of 'adequate benefit' or 'some benefit,' and one appears to apply a mixture of both.").

<sup>119</sup> See, e.g., Ferster, *supra* note 13, at 103 (advocating for a per se approach); Huefner, *supra* note 13, at 379 (advocating for a standard requiring "substantial progress" towards IEP goals).

<sup>120</sup> Ferster, *supra* note 13, at 103.

<sup>121</sup> *Id.* at 92.

<sup>122</sup> See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 827 (9th Cir. 2007) (Ferguson, J., dissenting).

<sup>123</sup> See Ferster, *supra* note 13, at 103; see also *supra* Part I.B.2.

<sup>124</sup> See, e.g., *Van Duyn*, 502 F.3d at 822 ("[W]e hold that a material failure to implement an IEP violates the IDEA."); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ("[W]e conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.").

<sup>125</sup> See Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 502 (1991) ("A process anchored more tightly to the IEP might have produced the same result in *Rowley* while

as well as the various amendments to the IDEA that stress the importance of measuring a student's progress towards her individual IEP goals.<sup>126</sup> This IEP-focused FAPE standard would require courts to consider whether a student has made "substantial progress toward at least a significant [number] of the [IEP] goals."<sup>127</sup> Tying the FAPE determination to the demonstrated level of progress towards IEP goals would result in more judicial attention to the carefully crafted IEP requirements detailed in the IDEA.<sup>128</sup>

Adopting an IEP-centric FAPE standard could greatly reduce some of the confusion surrounding compensatory educational services awards. As a first step, courts should begin to clearly enunciate when they are awarding "compensatory education" versus "additional services" instead of grouping the two remedies together under one vague title. Removing this simple source of ambiguity would aid courts in readily identifying which of these two common scenarios is being presented to them—namely, whether they are addressing the needs of a student who is protected by the IDEA or one who is no longer eligible.

A version of the IEP-centered FAPE standard would be particularly helpful when applied to "additional services" cases, though perhaps less functional in "compensatory education" cases. In the context of "additional services" cases, where the student is still protected by the IDEA, courts should look to the student's IEP goals, objectives, and assessment data to

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offering guidance as to how benefit is to be measured for other students."); *see also supra* notes 60-68 and accompanying text (outlining IEP requirements).

<sup>126</sup> *See* Huefner, *supra* note 13, at 373 (arguing that many courts have failed to reconsider the substantive *Rowley* standard "despite the clear emphasis on measurable progress since the 1997 amendments"); *see also* Huefner, *supra* note 78, at 196-98 (comparing the 1990 and 1997 versions of the IDEA IEP requirements). The 1997 amendments to the IDEA require IEPs to contain goals that are "measurable," as well as "[a] statement of . . . how . . . progress toward the . . . goals . . . will be measured." *Id.* at 127 (final alteration in original); *see also* Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 580 (2003) (arguing that the 1997 amendments to the IDEA "incorporate the high expectations of state educational standards into the programming for disabled students" and that these amendments "show that FAPE is now more than access to a basic floor of opportunity").

<sup>127</sup> Huefner, *supra* note 13, at 379.

<sup>128</sup> *See supra* Part I.B.2. Additionally, changing to an IEP-centered FAPE standard that focuses on measurable progress is in accord with the prevailing view that Congress, through the 1997 and 2004 amendments to the IDEA, "has raised the 'floor of opportunity' to ensure high expectations for educational achievement, participation in the general curriculum and preparation for independent living in adulthood." Ferster, *supra* note 13, at 83-84.

determine (1) whether the student is making sufficient progress towards her IEP goals and, if not, (2) whether the school has taken steps to appropriately revise the IEP goals, extend special education services, or improve instructional methods to address the lack of progress.<sup>129</sup> Using this standard, courts could better isolate the problem by identifying the lack of progress towards specific IEP goals, which they can remedy by crafting individually tailored “additional services” awards. For example, if a court finds that a student is not making adequate progress towards IEP goals and objectives related to reading, it can award the student “additional services” in the form of literacy tutoring.<sup>130</sup> This approach would reduce confusion (and thereby the need for expensive litigation), while also guiding the courts and administrative hearing officers in crafting appropriate, narrowly tailored remedies that address the individual student’s unique needs.

The IEP-centered approach, however, may be less appropriate in the “compensatory education” context where the student is no longer protected by the IDEA because of age or graduation status. In these cases, a more general but stricter FAPE standard should be applied because of the exceptional nature of the “compensatory education” remedy, which forces a school district to fund a student’s education past her twenty-first birthday.<sup>131</sup>

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<sup>129</sup> See Huefner, *supra* note 125, at 508 (advocating for the use of IEP goals and objectives as “reference points” in evaluating whether the student is receiving a FAPE). Under Huefner’s IEP-centered approach, evidence of trivial progress or regression toward IEP objectives “would be indications either that the goals and objectives, the special education services, or the methods and materials were inappropriate.” *Id.*

<sup>130</sup> This approach requires that the school district has complied with the IDEA’s IEP requirements—specifically, that the school district has provided the student with an IEP that contains measurable and appropriate annual goals given the student’s present level of functioning. See *supra* Part I.B.2. For example, a measurable annual goal might read: “Given a text passage of between 250 and 400 words at a sixth grade reading level, Curtis will read the passage aloud with 95-100% accuracy in three consecutive weekly trials.” *Curtis’ Sample IEP*, IEP QUALITY PROJECT, [https://iepq.education.illinois.edu/documents/studentscenarios/curtis/Curtis\\_IEP.pdf](https://iepq.education.illinois.edu/documents/studentscenarios/curtis/Curtis_IEP.pdf) (last visited Mar. 18, 2011). If the IEP goals are not measurable or not appropriate given the student’s present level of functioning, the court should require the creation of a new IEP that contains appropriate and measurable goals. See Huefner, *supra* note 125, at 512 (arguing that school districts should have the burden of demonstrating that the IEP contains measurable goals designed to address the student’s needs). Arguably, courts should adopt a rule that an IEP that lacks *measurable* goals is per se inappropriate. See 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2006) (requiring IEPs to contain “measurable annual goals” that meet the student’s needs and “enable[s] the child to be involved in and make progress in the general . . . curriculum”); see also *supra* notes 120-22 and accompanying text (discussing per se FAPE standard).

<sup>131</sup> See *infra* Part III.B.

### III. REMEDIES AVAILABLE UNDER THE IDEA

Once a student has been found to have been denied a FAPE—for procedural reasons, substantive reasons, or both—the hearing officer or court must devise an appropriate remedy. The IDEA does not expressly enumerate the forms of relief available to remedy a denial of a FAPE, but instead simply provides that courts can grant “such relief as the court determines is appropriate.”<sup>132</sup> Resolving which remedies are “appropriate” is a job that has largely been left to the courts,<sup>133</sup> and the Supreme Court has made it clear that courts have “broad discretion” in fashioning relief.<sup>134</sup> Courts and administrative hearing officers have granted injunctive relief,<sup>135</sup> monetary damages,<sup>136</sup> tuition reimbursement,<sup>137</sup> compensatory education,<sup>138</sup> additional services,<sup>139</sup> and attorneys’ fees<sup>140</sup> to remedy denials of FAPE.

#### A. *Tuition Reimbursement*

Much of the confusion surrounding compensatory educational services is due to the irregular evolution of the two remedies, which both have their roots in the tuition reimbursement remedy approved by the Supreme Court in

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<sup>132</sup> 20 U.S.C. § 1415(i)(2)(C)(iii).

<sup>133</sup> See YELL, *supra* note 7, at 294.

<sup>134</sup> Burlington Sch. Comm. v. Dep’t of Educ., 471 U.S. 359, 369 (1985).

<sup>135</sup> See, e.g., Taylor v. Honig, 910 F.2d 627, 633 (9th Cir. 1990) (affirming injunction).

<sup>136</sup> Compare Cappillino v. Hyde Park Cent. Sch. Dist., 40 F. Supp. 2d. 513, 515-16 (S.D.N.Y. 1999) (allowing a claim for damages under 42 U.S.C. § 1983 for a violation of the IDEA), and Emma C. v. Eastin, 985 F. Supp. 940, 945 (N.D. Cal. 1997) (same), and Walker v. District of Columbia, 157 F. Supp. 2d 11, 30 (D.D.C. 2001) (allowing compensatory damages for violations of the IDEA, but only in extraordinary circumstances), with Chambers *ex rel.* Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 185-86 (3d Cir. 2009) (compensatory and punitive damages not available under the IDEA), and Charlie F. v. Bd. of Educ., 98 F.3d 989, 991 (7th Cir. 1996) (same). For a discussion of monetary damages under the IDEA, see Seligmann, *supra* note 35.

<sup>137</sup> See, e.g., Burlington, 471 U.S. at 369 (allowing for tuition reimbursement); see also *infra* Part III.A.

<sup>138</sup> See, e.g., Miener *ex rel.* Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986) (allowing for compensatory education awards); see also *infra* Part III.B.

<sup>139</sup> See, e.g., Application of the Bd. of Educ., Appeal No. 06-040 (N.Y. State Educ. Dep’t June 19, 2006), <http://www.sro.nysed.gov/decisionindex/2006/06-040.htm> (awarding additional services); see also *infra* Part III.C.

<sup>140</sup> See, e.g., A.R. *ex rel.* R.V. v. N.Y.C. Dep’t of Educ., 407 F.3d 65, 75 (2d Cir. 2005) (upholding an award of attorneys’ fees for the prevailing party in an IDEA administrative hearing). The IDEA expressly provides for awards of attorneys’ fees. See 20 U.S.C. § 1415(i)(3)(B) (2006). While the IDEA permits attorneys’ fees awards, the Supreme Court has held that the IDEA does not allow prevailing parents to recover the costs of experts or consultants. See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300 (2006).

*Burlington School Committee v. Department of Education*.<sup>141</sup> Prior to *Burlington*, a commonly litigated issue was whether parents who unilaterally placed their child in a private school could seek reimbursement under the IDEA if they established that the public school placement was inappropriate.<sup>142</sup> Pre-*Burlington* courts and hearing officers often refused to award tuition reimbursement if the parents acted unilaterally, unless the parent could prove bad faith on the part of the school district.<sup>143</sup>

In *Burlington*, the parents sought tuition reimbursement after unilaterally placing their child in a private school because they believed that the proposed public school setting was inappropriate.<sup>144</sup> The Supreme Court unanimously held that parents could seek private school tuition reimbursement under the IDEA from the school district if the school failed to provide the child with an appropriate IEP.<sup>145</sup> Distinguishing tuition reimbursement from a damages award, Justice Rehnquist clarified that “[r]eimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.”<sup>146</sup>

After *Burlington*, the question remained as to whether parents could be reimbursed for private schools that did not meet the state’s educational standards.<sup>147</sup> The Supreme Court answered that question affirmatively in *Florence County School District Four v. Carter*, finding that a parent’s “failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.”<sup>148</sup> The *Carter* court clarified that parents are not held to the same

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<sup>141</sup> 471 U.S. 359 (1985).

<sup>142</sup> GUERNSEY & KLARE, *supra* note 1, at 231-32.

<sup>143</sup> See *Eugene B. Jr. v. Great Neck Union Free Sch. Dist.*, 635 F. Supp. 753, 756 (E.D.N.Y. 1986) (“In the view of both the Commissioner and the hearing officer, plaintiffs were not entitled to tuition reimbursement because they acted unilaterally in enrolling [the student] in the Lowell School and there were no ‘exceptional circumstances’ or ‘unique factual situations’ warranting an award of tuition in the face of such unilateral placement.”).

<sup>144</sup> 471 U.S. at 362.

<sup>145</sup> *Id.* at 369.

<sup>146</sup> *Id.* at 370-71.

<sup>147</sup> ROTHSTEIN & JOHNSON, *supra* note 25, at 334. Some courts had refused to award relief if the private school was not approved by the state education agency. See, e.g., *Antkowiak v. Ambach*, 838 F.2d 635, 642 (2d Cir. 1988) (concluding that the court could not award a placement at an unapproved private school).

<sup>148</sup> 510 U.S. 7, 14 (1993).

FAPE standard in selecting a private school.<sup>149</sup> Therefore, parents seeking tuition reimbursement are only required to establish that the public school system did not offer a FAPE and that the private school is appropriate.<sup>150</sup>

In later amendments to the IDEA, Congress clarified a number of issues that had arisen before and after the *Burlington* and *Carter* decisions.<sup>151</sup> The right to tuition reimbursement, along with specified limitations on the remedy, is now expressly provided for in the IDEA and the federal regulations.<sup>152</sup> Tuition reimbursement may be reduced or denied if the parents did not provide adequate notice to the school district, or if a court finds that the parents acted unreasonably.<sup>153</sup>

Despite the clarification provided by the new federal regulations, courts still struggled with the issue of whether students who were not previously enrolled in special education services in a public school could receive tuition reimbursement.<sup>154</sup> Initially, the circuit courts were split on the issue.<sup>155</sup> In *Greenland School District v. Amy N.*, the First Circuit found that "tuition reimbursement is only available for children who have previously received 'special education and related services.'"<sup>156</sup> The Second Circuit, in contrast, concluded that students who had not previously received special education services from the public school system were not precluded from seeking tuition reimbursement.<sup>157</sup> The Supreme Court, in *Forest Grove School District v. T.A.*, resolved the circuit split, holding that tuition

<sup>149</sup> *Id.* at 13 (finding that the requirements in 20 U.S.C. § 1401(a)(18)(A) (now § 1401(9)) "do not make sense in the context of a parental placement").

<sup>150</sup> *See id.*; *see also* 34 C.F.R. § 300.148(c) (2010).

<sup>151</sup> ROTHSTEIN & JOHNSON, *supra* note 25, at 334-35.

<sup>152</sup> 20 U.S.C. § 1412(a)(10)(A) (2006); 34 C.F.R. § 300.148(d) (outlining the limitations on reimbursement); *see also* Lewis M. Wasserman, *Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004*, 21 ST. JOHN'S J. LEGAL COMMENT. 171, 201-06 (2006).

<sup>153</sup> 34 C.F.R. § 300.148(d). Reimbursement may be reduced or denied if the parents do not notify the school district at the most recent IEP meeting that they are rejecting the public placement and enrolling their child in a private school at public expense, or if the parents fail to provide written notice to the school district at least ten days before removing their child. *Id.*

<sup>154</sup> ROTHSTEIN & JOHNSON, *supra* note 25, at 335.

<sup>155</sup> GUERNSEY & KLARE, *supra* note 1, at 233-34.

<sup>156</sup> 358 F.3d 150, 159 (1st Cir. 2004).

<sup>157</sup> *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 368 (2d Cir. 2006). The Eleventh Circuit also gave a broad interpretation to the availability of tuition reimbursement. *See M.M. ex rel. C.M. v. Sch. Bd.*, 437 F.3d 1085, 1099 (11th Cir. 2006) ("[W]e conclude that parents are not required in all cases to first enroll their child in public school pursuant to an inadequate IEP in order to preserve their right to reimbursement.").

reimbursement was an available remedy even for students who had not previously received special education services.<sup>158</sup>

While the decision in *Forest Grove* was considered a victory for parents of special education students,<sup>159</sup> the remedy of tuition reimbursement is generally not a viable option for low-income families that cannot afford the up-front financial burden of enrolling their children in costly private programs.<sup>160</sup> Parents who unilaterally place their children in private school run the risk that reimbursement will be limited or denied altogether.<sup>161</sup> Because of these risks, many parents will forgo the option of tuition reimbursement and rely on compensatory remedies instead.<sup>162</sup>

### B. *Compensatory Education*

Compensatory education has been a particularly important remedy for families unable to afford the “up front” risks of unilaterally enrolling their child in a private school.<sup>163</sup> As it evolved into a more developed and accepted remedy, it became the “coin of the realm” in cases arising under the IDEA.<sup>164</sup> In general, compensatory education is designed to remedy past denials of FAPE by making up for lost educational progress.<sup>165</sup> Compensatory education can be comprised of extended-day programming, summer school, tutoring, or other

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<sup>158</sup> 129 S. Ct. 2484, 2496 (2009) (“The IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.”). Prior to *Forest Grove*, an equally divided Supreme Court, in a *per curiam* opinion, affirmed a Second Circuit decision authorizing tuition reimbursement for students who had not previously received special education services. See *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007) (*per curiam*), *affg* 193 Fed. Appx. 26 (2d Cir. 2006); see also GUERNSEY & KLARE, *supra* note 1, at 234.

<sup>159</sup> Natalie Pyong Kocher, Note, *Lost in Forest Grove: Interpreting IDEA’s Inherent Paradox*, 21 HASTINGS WOMEN’S L.J. 333, 348 (2010) (“*Forest Grove* is viewed as a victory for parents of children with disabilities who may now seek reimbursement for private school tuition, even if their child never attended a public school.”).

<sup>160</sup> Emily Blumberg, Comment, *Recent Development: Forest Grove School District v. T.A.*, 45 HARV. C.R.-C.L. L. REV. 163, 176 (2010). In *Burlington*, the Court noted that “parents who unilaterally change their child’s placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.” *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 373-74 (1985).

<sup>161</sup> GUERNSEY & KLARE, *supra* note 1, at 234.

<sup>162</sup> Blumberg, *supra* note 160, at 165.

<sup>163</sup> Perry A. Zirkel, *The Remedy of Compensatory Education Under the IDEA*, 95 ED. L. REP. 483, 483 (1995).

<sup>164</sup> *Id.*

<sup>165</sup> See YELL, *supra* note 7, at 300.



related services.<sup>166</sup> The evolution of the remedy has created uncertainty over the availability of the remedy and the proper standard for calculating awards.

### 1. The Evolution of the Compensatory Education Remedy

The remedy of compensatory education grew out of the tuition reimbursement remedy authorized by the Supreme Court in *Burlington*.<sup>167</sup> Prior to *Burlington*, some courts had expressed concerns about granting awards of compensatory education, viewing the remedy as dangerously similar to a damages award.<sup>168</sup> Perceiving compensatory education as indistinguishable from damages, some courts adopted the Seventh Circuit's reasoning as laid out in *Anderson v. Thompson*, which held that damages are generally not available under the Act.<sup>169</sup> In *Anderson*, the Seventh Circuit reviewed the legislative history of the Act and concluded that it was "intended in most cases to provide only injunctive relief as a final procedural safeguard that would ensure an appropriate educational program for a handicapped child."<sup>170</sup> The court concluded that Congress had decided to ensure that students with disabilities would receive appropriate educations through an "elaborate system of procedural safeguards," rather than through compensatory relief.<sup>171</sup>

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<sup>166</sup> See *id.*

<sup>167</sup> Antonis Katsiyannis & John W. Maag, *Ensuring Appropriate Education: Emerging Remedies, Litigation, Compensation, and Other Legal Considerations*, 63 EXCEPTIONAL CHILD. 451, 458 (1997); see also *supra* Part III.A. Some commentators have described the compensatory education remedy as a "poor man's *Burlington*." Deborah A. Mattison & Stewart R. Hakola, *Availability of Damages and Equitable Remedies Under the IDEA, Section 504, and 42 U.S.C. Section 1983*, 7 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1, 2 (Special Report No. 7, 1992).

<sup>168</sup> See, e.g., *Powell v. Defore*, 699 F.2d 1078, 1081-82 (11th Cir. 1983) ("Any relief sought in the nature of compensatory education is the same as a claim for damages."); *Miener v. Missouri*, 498 F. Supp. 949, 951 (E.D. Mo. 1980), *aff'd in part and rev'd in part*, 673 F.2d 969 (8th Cir. 1982), *rev'd in part*, 800 F.2d 749 (8th Cir. 1986); *Alexopoulos v. Riles*, 784 F.2d 1408, 1412 (9th Cir. 1986) (finding that compensatory education is not a form of equitable relief, but more like a damages award); *but see Campbell v. Talladega Cnty. Bd. of Educ.*, 518 F. Supp. 47, 56 (N.D. Ala. 1981) (awarding two years of education past the student's twenty-first birthday to remedy a previous denial of a FAPE).

<sup>169</sup> *Anderson v. Thompson*, 658 F.2d 1205, 1209-10 (7th Cir. 1981); *Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir. 1982) (partially adopting reasoning of *Anderson*); *but see Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515-16 (S.D.N.Y. 1999) (allowing a claim for damages under 42 U.S.C. § 1983 for a violation of the IDEA).

<sup>170</sup> *Anderson*, 658 F.2d at 1210.

<sup>171</sup> *Id.* at 1212.

Despite finding that the statute did not generally allow for damages, the court, in dicta, outlined two “exceptional circumstances in which a limited damages award might be appropriate.”<sup>172</sup> According to *Anderson*, a limited damages award<sup>173</sup> might be appropriate if (1) the child’s physical health would otherwise be endangered,<sup>174</sup> or (2) if the school district acted in bad faith.<sup>175</sup> While some courts adopted *Anderson*’s exceptional circumstances exceptions,<sup>176</sup> other courts criticized the *Anderson* court for failing to distinguish general damages from tuition reimbursement.<sup>177</sup> Courts deciding the issue after the Supreme Court’s decision in *Burlington* determined that

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<sup>172</sup> *Id.* at 1213.

<sup>173</sup> In a footnote, the *Anderson* court clarified that tort liability damages would never be appropriate, only damages to compensate parents for the “costs of obtaining services that the school district was required to provide.” *Id.* at 1213 n.12.

<sup>174</sup> *Id.* at 1213-14 (“Congress, which so explicitly expressed its concern for the needs and rights of handicapped children, could not have intended a child to remain in a placement in which there was a serious risk of injury to that child’s physical health.”). The court carved out this exception by relying on *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981). In *Tatro*, the school district refused to provide catheterization for a student with spinal bifida and so the parents placed the student in a private center. *Id.* at 970-71, 978. The court did not decide whether damages were generally available, but simply concluded that when “parents cannot enroll the child without a risk of injury to the child because a school will not provide a required related service, appropriate relief ought to include the cost of alternative sources of education and therapy.” *Id.* at 978.

<sup>175</sup> *Anderson*, 658 F.2d at 1214 (“A second exceptional circumstance would exist when the defendant has acted in bad faith by failing to comply with the procedural provisions . . . in an egregious fashion.”). The *Anderson* court further explained the second exception to the general rule that damages are unavailable under the Act:

Congress could not have intended, however, that parents would keep their child in an inappropriate situation in a case in which the school district was acting in bad faith. In those circumstances, most parents could and likely would arrange unilaterally for the appropriate services. Should the parents finally prevail in their judicial action, in those circumstances money damages for the cost of these services should be awarded.

*Id.*

<sup>176</sup> See, e.g., *Gregg B. v. Bd. of Educ.*, 535 F. Supp. 1333, 1338 (E.D.N.Y. 1982) (“Such reasoning appears sound to this court.”); *Powell v. Defore*, 699 F.2d 1078, 1081 (11th Cir. 1983) (implying it would adopt the *Anderson* exceptional circumstances test); *Dep’t of Educ. v. Katherine D.*, 727 F.2d 809, 817 (9th Cir. 1983) (applying and expanding the *Anderson* exceptional circumstances test); see also Mark H. Van Pelt, Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469, 1471 n.8 (1984) (collecting cases adopting the *Anderson* test).

<sup>177</sup> *Doe v. Anrig*, 561 F. Supp. 121, 127 (D. Mass. 1983) (“In this court’s opinion, with respect, the *Anderson* court failed adequately to note the difference between general damages, which could be a very serious matter, and reimbursement for tuition payments that would have been the town’s responsibility under the appropriate IEP.”).

the *Anderson* test was too restrictive for determining when reimbursement was appropriate.<sup>178</sup>

Although the *Burlington* decision was decided in the context of tuition reimbursement,<sup>179</sup> the decision had a direct impact on the future of compensatory education.<sup>180</sup> Before *Burlington*, the Eighth Circuit, in *Miener v. Missouri*, adopted the *Anderson* view that “‘appropriate’ relief was generally intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the child.”<sup>181</sup> In *Miener*, the school district evaluated the student and found that she had severe learning disabilities and behavioral disorders stemming from a reoccurring brain tumor, but did not provide her with special education services.<sup>182</sup> Unable to afford any private options, the student’s father enrolled her in a state hospital and sought compensatory educational services to remedy the denial of a FAPE spanning her three-year hospitalization.<sup>183</sup>

The district court dismissed the claims for compensatory education, holding that a private right for damages could not be implied from the Act.<sup>184</sup> The Eighth Circuit affirmed the dismissal of the compensatory education claim on Eleventh Amendment grounds, but reversed and remanded the case back to the district court to decide other issues.<sup>185</sup> By the time the case reached the Court of Appeals for a second time, the *Burlington* decision had come down and the father reasserted the compensatory education claim in light of the Supreme Court’s decision.<sup>186</sup> The defendants argued that compensatory education did not fall within the new *Burlington* framework because compensatory education, unlike tuition reimbursement, did not seek to recompense the parents

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<sup>178</sup> See, e.g., *Jenkins v. Florida*, 815 F.2d 629, 631 (11th Cir. 1987) (“*Anderson* presents too restrictive a test to determine the appropriateness of reimbursement as a remedy.”).

<sup>179</sup> See 471 U.S. 359, 363 (1985); see also *supra* Part III.A.

<sup>180</sup> See *Katsiyannis & Maag*, *supra* note 167, at 458 (explaining that several of the Courts of Appeals have “extended the Supreme Court’s rationale in *Burlington* to support the award of compensatory education”).

<sup>181</sup> *Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir. 1982). Although the Eighth Circuit adopted the *Anderson* view, it declined to adopt the *Anderson* exceptions. *Id.* at 980 (“We depart from the Seventh Circuit’s analysis, however, insofar as that court in dictum recognized two exceptional circumstances in which a limited damage award might be appropriate.”).

<sup>182</sup> *Miener ex rel. Miener v. Missouri*, 800 F.2d 749, 751 (8th Cir. 1986).

<sup>183</sup> *Id.* at 751-52.

<sup>184</sup> *Miener v. Missouri*, 498 F. Supp. 949, 951 (E.D. Mo. 1980).

<sup>185</sup> *Miener v. Missouri*, 673 F.2d 969, 983 (8th Cir. 1982).

<sup>186</sup> *Miener ex rel. Miener*, 800 F.2d at 751.

for previous educational expenses.<sup>187</sup> The Eighth Circuit soundly rejected this argument, stating:

We cannot agree with the defendants that they should escape liability for these services simply because [the parent] was unable to provide them in the first instance; we believe that such a result would be consistent neither with *Burlington* nor with congressional intent. Like the retroactive reimbursement in *Burlington*, imposing liability for compensatory educational services on the defendants “merely requires [them] to belatedly pay expenses that [they] should have paid all along.” Here, as in *Burlington*, recovery is necessary to secure the child’s right to a free appropriate public education. We are confident that Congress did not intend the child’s entitlement to a free education to turn upon her parent’s ability to “front” its costs.<sup>188</sup>

Following the *Burlington* and *Miener* decisions, courts began to adopt compensatory education as an “appropriate” remedy available for students who had been denied a FAPE.<sup>189</sup> Courts reasoned that Congress would not have intended the availability of a remedy to depend on a parent’s ability to front the costs of private education.<sup>190</sup>

Even the U.S. Department of Education has now recognized the importance of compensatory education as an available remedy under the IDEA.<sup>191</sup> In 1990, in response to an inquiry, the U.S. Department of Education’s Office of Special Education Programs (OSEP) stated its position on compensatory education as an available remedy.<sup>192</sup> Citing the *Miener* decision, the OSEP stated that it recognized compensatory education as a remedy for a denial of a FAPE.<sup>193</sup> It also stressed that compensatory education is an especially

<sup>187</sup> *Id.* at 753.

<sup>188</sup> *Id.* (quoting *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 370-71 (1985)).

<sup>189</sup> See, e.g., *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 188-89 (1st Cir. 1993) (relying on *Miener*’s extension of *Burlington* to award compensatory education); *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 406-07 (6th Cir. 1991) (same); *Lester H. v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990) (same); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated and remanded on other grounds sub nom. Sobol v. Burr*, 492 U.S. 902 (1989), *reaff’d*, 888 F.2d 258 (2d Cir. 1989) (same); *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (same).

<sup>190</sup> *Lester H.*, 916 F.2d at 872-73 (“[W]e conclude that Congress, by allowing the courts to fashion an appropriate remedy to cure the deprivation of a child’s right to a free appropriate public education, did not intend to offer a remedy only to those parents able to afford an alternative private education.”).

<sup>191</sup> See OSEP Policy Letter, 17 E.H.L.R. 522, 522-23 (U.S. Dep’t of Educ. Office of Special Educ. Programs, Feb. 13, 1990).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 523.

important remedy for parents who cannot afford appropriate private placements for their children.<sup>194</sup>

## 2. Compensatory Education: Confusion over Age Limits and Award Calculations

While compensatory education became widely accepted as an available remedy, courts differed on whether such an award could exceed the IDEA's age limit.<sup>195</sup> The IDEA provides that states must generally provide a FAPE to all students with disabilities between the ages of three and twenty-one, with a few exceptions.<sup>196</sup> Some courts read this statutory age limit as a bar to any compensatory education awards that required a school district to provide educational services beyond the age twenty-one.<sup>197</sup>

In 1988, the Supreme Court, in *Honig v. Doe*, adopted the position that the statutory protections of the Act did not extend past age twenty-one.<sup>198</sup> The circuit courts, however, have declined to read the *Honig* decision as relevant in the compensatory education setting.<sup>199</sup> The First Circuit, in *Pihl v. Massachusetts Department of Education*, explained the inapplicability of *Honig* in the context of compensatory education:

The crucial difference between *Honig* and this case is the nature of the relief requested. In *Honig*, Doe was asking the court to make the school district comply with the Act in the future. But, because Doe was beyond the age of entitlement for services, he had no right to

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<sup>194</sup> *Id.* (“[C]ompensatory education may be the only means through which children [who] are forced to remain in an inappropriate placement due to their parents’ financial inability to pay for an appropriate private placement would receive FAPE.”). Additionally, it is the OSEP’s position that compensatory education can be awarded by impartial hearing officers and that the remedy can take the form of summer school programs. *Id.*

<sup>195</sup> GUERNSEY & KLARE, *supra* note 1, at 237.

<sup>196</sup> 20 U.S.C. § 1412(a)(1)(B) (2006). The IDEA gives states some flexibility in determining whether or not to provide children between the ages of three to five and eighteen to twenty-one with public education. *Id.* It has been argued that the IDEA probably would not have passed without this limitation, which “recognized that the states themselves should have some autonomy to continue to educate certain age groups.” TURNBULL III, *supra* note 32, at 37.

<sup>197</sup> See, e.g., *Alexopoulos v. Riles*, 784 F.2d 1408, 1413 (9th Cir. 1986) (“To grant appellants’ request for compensatory education would require the District to continue providing [the student] with educational services beyond the maximum age indicated in the statute. This result was not intended by Congress.”).

<sup>198</sup> 484 U.S. 305, 318 (1988) (“[The student] is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21.”).

<sup>199</sup> Solomon A. Metzger, *Compensatory Education Under the Individuals with Disabilities Education Act*, 23 CARDOZO L. REV. 1839, 1862 (2002).

demand that the school district comply with the Act either presently or in the future. By contrast, Karl Pihl is asking only that the court compensate him for rights that he claims the school district denied him in the past.<sup>200</sup>

Thus, courts have been willing to award compensatory education, even if the student is older than twenty-one, as long as the denial of a FAPE occurred while the student was protected by the IDEA.<sup>201</sup> If courts strictly applied the statutory age limit in compensatory education cases, then school districts could essentially avoid providing a FAPE to students approaching the age limit.<sup>202</sup>

Further adding to the confusion surrounding the compensatory education remedy is the fact that courts are not in agreement on how to calculate awards.<sup>203</sup> Some courts apply an hour-for-hour formula to determine the appropriate amount of compensatory education to award a student who has been denied a FAPE.<sup>204</sup> Other courts, however, have rejected this approach as overly mechanical, and instead apply a more flexible and individualized approach that better reflects the

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<sup>200</sup> Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993).

<sup>201</sup> See, e.g., *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990) (A student with disabilities who has been denied a FAPE "has the right to ask for compensation because the School District violated his statutory rights while he was still entitled to them."). This view can also draw support from the Supreme Court's decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In a footnote, the Supreme Court recognized that a "continuing controversy" exists even when a student has graduated from high school when the parents are seeking reimbursement for expenses incurred while the student was protected by the statute. *Id.* at 4 n.2.

<sup>202</sup> *Lester H.*, 916 F.2d at 872. The Third Circuit explained the potentially dangerous result of strictly applying the statutory age limit examined in *Honig* to compensatory education cases:

If *Honig* stands for the proposition defendants assert, school districts would be immune from suit if they simply stopped educating intended beneficiaries of the [IDEA] at age 18 or 19. Those beneficiaries' cases would take at least two years to be reviewed, and even if the reviewing courts found the school districts' behavior egregious, the courts would be powerless to aid the intended beneficiaries because those beneficiaries would now be over age 21. We cannot believe that either Congress or the Supreme Court meant to allow a school district to withhold a disabled minor's educational rights at age 18 or 19 without remedy.

*Id.*

<sup>203</sup> Compare *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) ("child is entitled to compensatory education for a period equal to the period of deprivation"), with *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (rejecting hour-for-hour "cookie-cutter approach").

<sup>204</sup> *M.C.*, 81 F.3d at 397; *Westendorp v. Indep. Sch. Dist. No. 273*, 35 F. Supp. 2d 1134, 1138 (D. Minn. 1998) (awarding six years of compensatory education to remedy a six year denial of a FAPE).

equitable considerations emphasized by the Supreme Court in *Burlington and Carter*.<sup>205</sup>

In *Friendship Edison Public Charter School Collegiate Campus v. Nesbitt*, the court took a more flexible approach in calculating a compensatory education award.<sup>206</sup> According to *Nesbitt*, a court should fashion an individually tailored “compensatory education plan” that is designed to compensate the student for the “grade-level progress not made . . . or educational benefits that did not accrue due to the loss of FAPE.”<sup>207</sup> Under the grade-level approach a court would compare the projected grade-level progress a student would have made if provided with a FAPE with the actual grade-level progress (or regression) the student made “in spite of the denial of FAPE.”<sup>208</sup> Subtracting the latter from the former yields the educational benefit that the student did not receive due to the FAPE denial.<sup>209</sup> Finally, the court must estimate how many instructional hours the student requires to make up for the lost educational benefit.<sup>210</sup> While the grade-level approach requires more evidence of past and present levels of academic and functional levels, along with learning rate projections based on the cognitive abilities of the student, the result is a more appropriately tailored remedy.<sup>211</sup> Given the holistic nature of this award formulation, however, courts should only apply the grade-level approach to “compensatory education” cases, while using the IEP-centered approach to calculate narrower awards in “additional services” cases.<sup>212</sup>

### C. Additional Services

While courts have awarded “compensatory education” to students both over and under the age of twenty-one,<sup>213</sup> some

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<sup>205</sup> *Reid*, 401 F.3d at 523; see also *supra* Part III.A.

<sup>206</sup> *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 669 F. Supp. 2d 80 (D.D.C. 2009).

<sup>207</sup> *Id.* at 86.

<sup>208</sup> *Id.* at 85.

<sup>209</sup> *Id.* The *Nesbitt* opinion provides helpful formulas for estimating the amount of grade-level progress a student forfeited due to a lack of a FAPE. *Id.*

<sup>210</sup> *Id.* at 86.

<sup>211</sup> One disadvantage to this approach is that parents may have to hire experts to establish a student’s average learning rate and cognitive ability. Unfortunately, expert witness fees are not recoupable under the IDEA. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006).

<sup>212</sup> See *supra* notes 125-30 and accompanying text.

<sup>213</sup> See *supra* Part III.B.

administrative hearing officers use the term “additional services” to denote awards to students who are under twenty-one and still protected by the IDEA.<sup>214</sup> The additional services remedy, while not fully developed, has taken the form of tutoring services,<sup>215</sup> make-up counseling services,<sup>216</sup> and home instruction.<sup>217</sup>

Courts that award additional services to remedy denials of FAPE generally do so under the guise of awarding a compensatory education remedy.<sup>218</sup> Although the courts have not distinguished between compensatory education and additional services, the New York State Review Officer (SRO) has drawn a distinction between the two types of remedies.<sup>219</sup> The SRO has explained the difference between compensatory education and additional services as follows:

While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded “additional services” to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation.<sup>220</sup>

Although some commentators have criticized the distinction between compensatory education and additional services as “arbitrary,”<sup>221</sup> the distinction could serve some practical

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<sup>214</sup> See, e.g., Application of a Student with a Disability, Appeal No. 08-072, 11 (N.Y. State Educ. Dep’t Oct. 15, 2008), <http://www.sro.nysed.gov/decisionindex/2008/08-072.pdf> (distinguishing compensatory education from additional services).

<sup>215</sup> Application of a Student with a Disability, Appeal No. 09-035, 13 (N.Y. State Educ. Dep’t Apr. 22, 2009), <http://www.sro.nysed.gov/decisionindex/2009/09-035.pdf> (awarding one-to-one multi-sensory reading instruction as additional services).

<sup>216</sup> Application of a Student with a Disability, Appeal No. 09-044, 21 (N.Y. State Educ. Dep’t June 25, 2009), <http://www.sro.nysed.gov/decisionindex/2009/09-044.pdf> (awarding additional counseling sessions to compensate for sessions not provided).

<sup>217</sup> Application of a Student with a Disability, Appeal No. 08-035, 24 (N.Y. State Educ. Dep’t June 20, 2008), <http://www.sro.nysed.gov/decisionindex/2008/08-035.pdf> (awarding ten months of home instruction as additional services).

<sup>218</sup> See, e.g., *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008) (awarding compensatory education to a student under twenty-one); *Student X v. N.Y.C. Dep’t of Educ.*, No. 07-CV-2316, 2008 WL 4890440, at \*24 (E.D.N.Y. Oct. 30, 2008) (same).

<sup>219</sup> See Application of a Student with a Disability, Appeal No. 10-057, 7 (N.Y. State Educ. Dep’t Aug. 19, 2010), <http://www.sro.nysed.gov/decisionindex/2010/10-057.pdf>; see also Application of a Student with a Disability, Appeal No. 08-072, 11 (N.Y. State Educ. Dep’t Oct. 15, 2008), <http://www.sro.nysed.gov/decisionindex/2008/08-072.pdf>.

<sup>220</sup> Application of a Student with a Disability, Appeal No. 08-072, 11 (N.Y. State Educ. Dep’t Oct. 15, 2008), <http://www.sro.nysed.gov/decisionindex/2008/08-072.pdf>.

<sup>221</sup> H. Jeffery Marcus, 2008 *Special Education Law Update*, 188 PLI/NY 213, 225 (May 6, 2009) (arguing that the *Student X* decision “should help to reinforce that the SRO’s arbitrary distinction between ‘additional services’ and compensatory education



purposes. Some courts have been operating under the assumption that compensatory education can only be awarded when the student would otherwise not be eligible for educational services.<sup>222</sup> In *Manchester School District v. Christopher B.*, the United States District Court for the District of New Hampshire explained that after thoroughly reviewing the compensatory education case law, it had determined that compensatory education had only been awarded in two circumstances.<sup>223</sup> According to *Christopher B.*, there are only two instances when compensatory education can be awarded: (1) when the student is no longer eligible for services under the IDEA or (2) during summer vacation.<sup>224</sup> The court explained that “[t]he unifying principle behind the two forms of compensatory education is that both involve the provision of education services during time periods in which the local educational authority is not already obligated to provide the student a free appropriate education.”<sup>225</sup>

This limited view of the availability of compensatory education is understandable given the definition of “compensatory education” that the courts have developed. For example, the Third Circuit has defined compensatory education as an award that “requires a school district to provide education past a child’s twenty-first birthday to make up for any earlier deprivation.”<sup>226</sup> In a footnote to this definition, the Third Circuit recognized that compensatory education had also been awarded during the summer, instead of after the student’s twenty-first birthday.<sup>227</sup> Similarly, the Sixth Circuit has described compensatory education as “a judicially-constructed form of

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should be relegated to historical artifact”). Despite the *Student X* decision, the New York SRO continues to apply the distinction between compensatory education and additional services. See, e.g., Application of a Student with a Disability, Appeal No. 10-057, 7 (N.Y. State Educ. Dep’t Aug. 19, 2010), <http://www.sro.nysed.gov/decisionindex/2010/10-057.pdf> (recognizing that *Student X* allows for compensatory education awards to students under the age twenty-one, but still distinguishing additional services).

<sup>222</sup> See *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860, 868-69 (D.N.H. 1992).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 869; see also *Bd. of Educ. v. Ill. State Bd. of Educ.*, 21 F. Supp. 2d 862, 880 (N.D. Ill. 1998), *vacated on other grounds sub nom.* *Bd. of Educ. v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000) (“A court award of compensatory education requires a school district to provide education either during the summer months or past a child’s twenty-first birthday to make up for any earlier deprivation.” (citing *M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir. 1996))).

<sup>226</sup> *M.C. ex rel. J.C.*, 81 F.3d at 395.

<sup>227</sup> *Id.* at 395 n.3.

relief designed to remedy past educational failings for students who are no longer enrolled in public school due to their age or graduation.”<sup>228</sup> Without clarification from Congress or the courts, this confusion is likely to continue into the future.

#### IV. PROBLEMS AND SOLUTIONS: AVOIDING CONFUSION BY DISTINGUISHING BETWEEN FORMS OF RELIEF

The confusion over whether compensatory education can be awarded to a school-age student who is still protected by the IDEA could be alleviated by simply distinguishing between the two types of compensatory educational services. To remedy denials of FAPE, courts and administrative hearing officers should award “compensatory education” to students no longer covered by the IDEA, while awarding “additional services” to students still falling under the IDEA’s protections. The failure to distinguish compensatory education from additional services has also led to confusion over what standards courts should apply when analyzing compensatory awards, especially in the Second Circuit.<sup>229</sup> This part uses the Second Circuit’s “gross violation” standard as an example of the extent of the confusion caused by the current application of the IDEA, and proposes solutions to prevent such confusion and to help craft better remedies for disabled students.

##### A. *Adding to the Confusion: The Second Circuit’s “Gross Violation” Standard*

The Second Circuit has formulated a “gross violation” standard, which it applies to compensatory education cases.<sup>230</sup> Under the standard, compensatory education is unavailable to a “claimant over the age of twenty-one in the absence of ‘gross’ procedural violations.”<sup>231</sup> The Second Circuit’s “gross violation” standard originated in the case *Burr v. Ambach*.<sup>232</sup> In *Burr*, the student sought one and one-half years of compensatory education beyond age twenty-one to make up for services that

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<sup>228</sup> *Barnett v. Memphis City Schs.*, 113 Fed. Appx. 124, 126 (6th Cir. 2004) (citing *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993)).

<sup>229</sup> *See, e.g., Student X v. N.Y.C. Dep’t of Educ.*, No. 07-CV-2316, 2008 WL 4890440, at \*24 (E.D.N.Y. Oct. 30, 2008).

<sup>230</sup> *See, e.g., Garro v. Connecticut*, 23 F.3d 734, 737 (2d Cir. 1994).

<sup>231</sup> *Id.*

<sup>232</sup> *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated sub nom. Sobol v. Burr*, 422 U.S. 902 (1989), *reaff’d*, *Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989).

were not provided to him during a lengthy hearing and appeal process.<sup>233</sup> Since the regulations required the hearing officer to make a determination within forty-five days of a request and the decision took over a year, the court found that the federal regulations had been “grossly violated” and awarded the student compensatory education.<sup>234</sup>

Two years later, the Second Circuit applied the “gross violation” standard in *Mrs. C. v. Wheaton*.<sup>235</sup> In *Mrs. C.*, the State of Connecticut discharged a twenty-year-old student with intellectual disabilities from his educational placement without providing any notice to his mother, who was not given the chance to participate in the termination decision.<sup>236</sup> *Mrs. C.* challenged the termination decision and sought compensatory education, but a Connecticut hearing officer found that the student had consented to the termination, and thus denied relief.<sup>237</sup> The district court affirmed the decision, finding that a student over the age of eighteen can voluntarily consent to the termination of his educational placement.<sup>238</sup> The Second Circuit reversed, finding that the IDEA’s procedural safeguards require parental notice before any proposed change of placement, even if the child has reached the age of majority.<sup>239</sup>

Turning to the compensatory education claim, the *Mrs. C.* court cited *Burr* for the proposition that compensatory education is proper when the IDEA regulations have been “grossly violated.”<sup>240</sup> The court then highlighted the fact that the “gross violations” in *Burr* “resulted in exclusion of the student from school for a substantial period of time.”<sup>241</sup> By comparison to the violations in *Burr*, the *Mrs. C.* court concluded that the student in question had properly stated a claim for compensatory education because the state’s procedural violations had resulted in his “complete exclusion from an educational placement.”<sup>242</sup>

The Second Circuit, in *Garro v. Connecticut*, again applied the “gross violation” standard to dismiss a request for

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<sup>233</sup> *Id.* at 1073-74.

<sup>234</sup> *Id.* at 1075.

<sup>235</sup> *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990).

<sup>236</sup> *Id.* at 70-71.

<sup>237</sup> *Id.* at 71.

<sup>238</sup> *Id.* at 72-73.

<sup>239</sup> *Id.* at 73.

<sup>240</sup> *Id.* at 75.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

compensatory education.<sup>243</sup> *Garro* arose in the context of a challenge to a hearing officer's determination that a student was not eligible for special education.<sup>244</sup> Without detailing the facts of the case, the *Garro* court simply stated that Garro, who was over twenty-one, had merely alleged "unspecified procedural violations of the IDEA."<sup>245</sup> The court concluded that Garro was not entitled to compensatory education "in the absence of 'gross' procedural violations."<sup>246</sup>

Arguably, the Second Circuit's "gross violation" standard is not actually a standard at all, but merely a method of characterizing the facts of those cases.<sup>247</sup> Regardless, both the Second Circuit and other courts have recognized the "gross violation" standard as the applicable rule in the Second Circuit for compensatory education cases.<sup>248</sup> For example, the Third Circuit, in *M.C. ex rel. J.C. v. Central Regional School District*, explicitly rejected the Second Circuit's "gross violation" standard, finding that it was "imprecise" and "not anchored in the structure or text of the IDEA."<sup>249</sup> Furthermore, although the "gross violation" standard was originally applied in cases of procedural violations, some courts and commentators have generalized the Second Circuit's rule as requiring a "gross violation of the IDEA."<sup>250</sup>

In *Student X. v. New York City Department of Education*, the United States District Court for the Eastern

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<sup>243</sup> *Garro v. Connecticut*, 23 F.3d 734 (2d Cir. 1994).

<sup>244</sup> *Id.* at 736.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 737.

<sup>247</sup> See Metzger, *supra* note 199, at 1860 n.111 ("The position of the Second Circuit is not entirely plain because the reported cases there all deal with egregious circumstances and it may be that the discussion of gross violations is not meant to state a threshold, but merely describes the facts presented.").

<sup>248</sup> See, e.g., *Somoza v. N.Y.C. Dep't of Educ.*, 538 F.3d 106, 109 n.2 (2d Cir. 2008) ("An award of compensatory education is appropriate only for gross violations of the IDEA." (citing *Garro*, 23 F.3d at 737)); *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396 (3d Cir. 1996) ("The Second Circuit has conditioned an award of compensatory education on the presence of a 'gross' deprivation of the right to free and appropriate education." (citing *Garro*, 23 F.3d at 737; *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990))); *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 151 (N.D.N.Y. 1997) ("The Second Circuit, however, allows for compensatory education for a child over twenty-one years where there has been a gross violation of the IDEA." (citing *Mrs. C.*, 916 F.2d at 75)).

<sup>249</sup> *M.C.*, 81 F.3d at 396.

<sup>250</sup> See, e.g., *Somoza*, 538 F.3d at 109 n.2 ("An award of compensatory education is appropriate only for gross violations of the IDEA." (citing *Garro*, 23 F.3d at 737)); GUERNSEY & KLARE, *supra* note 1, at 236 n.65 (generalizing the Second Circuit's rule as requiring "gross violations of the IDEA").

District of New York struggled with the application of the Second Circuit's "gross violation" standard.<sup>251</sup> In *Student X*, the student was an eleven-year-old who had been diagnosed with autism and other health impairments, which resulted in delays in motor and cognitive skills.<sup>252</sup> The parent had spent several years fighting the school district through the impartial hearing process over the provision of at-home Applied Behavioral Analysis (ABA) services for Student X.<sup>253</sup> In 2006, the parent again challenged the student's IEP, arguing that it was not "reasonably calculated" to provide Student X with a FAPE.<sup>254</sup> While the proceedings were pending, the district stopped providing Student X with the ABA at-home services.<sup>255</sup> Although the court ultimately decided that the 2006 IEP provided Student X with a FAPE, it also found that the school district had wrongfully terminated the at-home ABA services in violation of the IDEA's "stay-put" provision.<sup>256</sup> The court concluded that Student X was entitled to compensatory education because the school district wrongfully denied him the at-home services.<sup>257</sup>

In making its decision, the court first addressed the availability of compensatory education for students who are under twenty-one and still protected by the IDEA.<sup>258</sup> The school district, relying on *Burr* and *Mrs. C.*, had argued that Student X was not eligible for compensatory education because he was under twenty-one.<sup>259</sup> The court rejected this argument, concluding that just because "earlier cases found that courts may award compensatory education for individuals over age twenty-one . . . does not preclude such an award for students

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<sup>251</sup> *Student X v. N.Y.C. Dep't of Educ.*, No. 07-CV-2316, 2008 WL 4890440, at \*24 (E.D.N.Y. Oct. 30, 2008).

<sup>252</sup> *Id.* at \*4.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at \*1.

<sup>255</sup> *Id.* at \*20.

<sup>256</sup> *Id.* The IDEA's "stay-put" provision provides, *inter alia*, that:

[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j) (2006); *see also* 34 C.F.R. § 300.518 (2010) (detailing the "stay-put" requirement).

<sup>257</sup> *Student X*, 2008 WL 4890440, at \*23.

<sup>258</sup> *Id.* at \*24.

<sup>259</sup> *See id.*

under age twenty-one.”<sup>260</sup> Although distinguishing between the two compensatory remedies, and clarifying that “additional services” are the appropriate remedy for students under twenty-one, would eliminate the need for this issue to be litigated in other courts in the future, the court did not do so.

The *Student X* court then proceeded to struggle with the issue of whether the “gross violation” standard should apply in the context of awards to students under twenty-one.<sup>261</sup> The court concluded—without deciding the issue—that “regardless of whether a gross violation of the [IDEA] is required to merit compensatory education, Defendant’s unlawful termination of Student X’s pendency entitlement is nonetheless such a violation.”<sup>262</sup> The court assumed the “gross violation” standard applied, but did not pronounce whether it would apply the standard in the future.<sup>263</sup> Expressing concern over the vagueness of the “gross violation” standard, the *Student X* court recognized that the “caselaw on what constitutes a gross violation is sparse.”<sup>264</sup> The court acknowledged that Student X had not been “completely deprived of all education” by the school district’s wrongful termination of his at-home ABA services, but found that the district’s direct violation of the IDEA’s pendency provision was sufficient to establish a “gross violation.”<sup>265</sup> Thus, while earlier courts required a total deprivation of educational benefit to establish a “gross violation,”<sup>266</sup> later courts have been willing to find a “gross violation” even when the student was receiving some educational benefit.

This confusion shows that, in addition to distinguishing between compensatory education and additional services awards, the Second Circuit needs to clarify when, if ever, the “gross violation” standard applies. Arguably, this heightened standard has been taken out of context over the years by transplanting it from purely procedural settings into cases turning on substantive denials of FAPE. Even in the procedural context, however, the “gross violation” standard

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at \*24-25.

<sup>262</sup> *Id.* at \*24.

<sup>263</sup> *Id.* at \*24-25.

<sup>264</sup> *Id.* at \*25.

<sup>265</sup> *Id.* (“Defendant ignored the plain language of the statute and regulations and deprived Student X of services to which Student X was unequivocally entitled regardless of the merits of his case. The court finds this a gross violation of the [IDEA].”).

<sup>266</sup> See *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990); see also *supra* notes 241-242 and accompanying text.

appears to conflict with the evolving spirit and purpose of the IDEA.<sup>267</sup> While compensatory education cases deserve a more stringent standard than additional services cases, courts should not allow school districts to escape liability through a heightened “gross violation” standard. Instead, given Congress’s emphasis on procedural safeguards, courts should adopt a standard that comports with the 2004 IDEA amendments to assess whether the school district substantially complied with the procedural requirements of the IDEA.<sup>268</sup>

Even after deciding that Student X was entitled to a compensatory remedy, the court struggled with the calculation of an appropriate award.<sup>269</sup> Although crafting an award under the IDEA depends on “equitable considerations,” the Second Circuit has not articulated a method for computing compensatory awards.<sup>270</sup> In the end, the court decided to award Student X compensatory relief in a mechanical fashion: “Defendant is ordered to fund and provide ten hours per week of at-home ABA and five hours per week of speech and language therapy, for fifty-seven weeks, the amount of time that Student X was unlawfully deprived of the services from March 1, 2007 to March 31, 2008.”<sup>271</sup> While this hour-for-hour approach might work well enough in some cases, often a student will require more educational hours than he was originally denied to *compensate* him for the denial of a FAPE, especially if the student has regressed due to the school’s failure.<sup>272</sup> Courts could avoid some of these calculation ambiguities by adopting the IEP-centered FAPE standard for “additional services” cases<sup>273</sup> and the grade-level standard for “compensatory education” cases.<sup>274</sup>

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<sup>267</sup> See *supra* notes 125-126.

<sup>268</sup> See *supra* note 98 (providing the text of the 2004 amendment to the IDEA that addresses procedural violations).

<sup>269</sup> *Student X*, 2008 WL 4890440, at \*26; see also *supra* notes 203-211 and accompanying text (discussing the calculation of compensatory awards).

<sup>270</sup> *Student X*, 2008 WL 4890440, at \*26.

<sup>271</sup> *Id.*

<sup>272</sup> Furthermore, the hour-for-hour calculation will not be very helpful to courts when the denial of a FAPE is not due to a school’s failure to provide the student a particular service, but rather due to an inappropriate placement.

<sup>273</sup> See *supra* notes 127-130 and accompanying text.

<sup>274</sup> See *supra* notes 207-211 and accompanying text.

### B. *Summary of Proposals*

As the cases applying the Second Circuit's "gross violation" standard show, the confusion in the types of relief under the IDEA and the standards applied to analyze claims under the IDEA leaves this area of law in disarray. The consequences of this confusion ultimately falls upon students with disabilities and their families, who are faced with uncertain standards and even less certainty in what type of relief they may be able to obtain.

To address this confusion, courts should begin to distinguish between these two different forms of relief: (1) "compensatory education" awards for students over twenty-one, and (2) "additional services" awards for students still protected by the IDEA. As long as courts refuse to make this simple distinction, parents and school districts will continue to take these cases to the courts, seeking clarification. This distinction would resolve a lot of uncertainty as to when compensatory remedies are available to remedy a denial of a FAPE, and would help move the circuit courts towards consistent application of appropriate standards.

Most importantly, by distinguishing at the outset of a case between the two types of compensatory remedies—and which type was being sought in that particular case—courts could apply standards that would be more appropriate for ultimately crafting a remedy. In "additional services" cases courts should apply the IEP-centered approach for making both the FAPE determination and for crafting narrower, goal-focused remedies.<sup>275</sup> This individually-centered approach would likely result in more appropriately tailored additional services awards to students at younger ages when the services will be more effective. The IEP approach would also encourage schools to focus more seriously on the measurable goal-setting requirements of the IDEA.<sup>276</sup>

In "compensatory education" cases, however, courts should apply the heightened "meaningful benefit" standard that evolved from *Rowley* to determine whether a student was provided with a FAPE.<sup>277</sup> If the court finds that the student was denied a FAPE, it should then use the grade-level approach to calculate a more holistic remedy that allows the student to

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<sup>275</sup> See *supra* notes 125-130 and accompanying text.

<sup>276</sup> See *supra* notes 60-68 and accompanying text.

<sup>277</sup> See *supra* notes 107-118 and accompanying text.



make up the grade-level benefits she lost due to the denial of a FAPE.<sup>278</sup> This broader approach is necessary for students who are aging out of the IDEA's coverage because a compensatory education award will likely be the student's last chance to receive a publicly funded FAPE.

Finally, courts should not adopt the Second Circuit's "gross violation" standard for either compensatory education or additional service determinations.<sup>279</sup> Although it originated in the context of purely procedural violations, there is the risk that courts will mistakenly apply the overly restrictive standard to all compensatory education cases, even those turning on substantive denials of a FAPE.<sup>280</sup> Even in the case of purely procedural violations, however, the standard arguably conflicts with Congress's increased emphasis on the IDEA's procedural mandates.<sup>281</sup> Instead of the "gross violation" standard, courts should apply the standard Congress adopted in the 2004 amendments to the IDEA to determine when procedural violations amount to a denial of a FAPE.<sup>282</sup>

## CONCLUSION

Without clarification from the courts or from Congress, school districts and parents will continue to litigate compensatory educational services cases. By treating "compensatory education" and "additional services" as distinct remedies, administrative hearing officers and courts can make better FAPE determinations and also calculate more meaningful awards. Just as the standards for tuition reimbursement have evolved over time, it is time for the courts to advance clearer standards in compensatory education and additional services cases.

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<sup>278</sup> See *supra* notes 207-211 and accompanying text.

<sup>279</sup> For a discussion of the Second Circuit's "gross violation" standard see *supra* notes 230-246 and accompanying text.

<sup>280</sup> See *supra* note 250 and accompanying text.

<sup>281</sup> See *supra* notes 98, 125-126 and accompanying text.

<sup>282</sup> See *supra* note 98.

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